

# Product advertising – just not too creative

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Advertising stimulates business. And digitalisation opens up many opportunities to disseminate sales-promoting information cost-effectively alongside print media. However, this is often overlooked: Not everything is allowed – this also applies to the cosmetics industry.

In the cosmetics industry, manufacturers, retailers and treatment institutes are subject to the European Cosmetic Directive (German: KVO). It determines which substances are regulated and prohibited in products, how products must be labelled, which information on use and disposal must and may be provided on the packaging. Furthermore, it defines the responsible persons, the safety report, the manufacturing practice and the notification procedure for cosmetics.

The KVO is subordinate to the German Food, Consumer Goods and Feed Code (LFGB). This is the successor to the Foodstuffs and Commodities Act (LMBG).

Product labels are a form of advertising, but label fraud must not be practised. The institutes' own labels are not uncommon. They are attached – for example with institute names and addresses and catchy slogans – next to the manufacturer's label. Gluing over or exchanging the manufacturer's labels and attaching one's own labels are further variants that are usually not in conformity with the KVO. Filling from cabin goods into self-labelled containers and their sale are also prohibited.

Pharmacies are also subject to the KVO and have no special rights in this respect. For example, a pharmacy had to discontinue its mail order business because, among other things, the labelling obligations under the KVO were not complied with (VG Ansbach, judgement of 20.11.2012 – AN 1 K 11.02002035). This legal dispute sheds light on the pitfalls of the KVO in detail.<sup>1</sup>

## Product contents

Product advertising in flyers, brochures, the internet and social networks as well as in the institutes in the form of displays and posters etc. occupies a large space. In this respect, Article 20, § 1 ("Advertising statements"), of the KVO is important. It states: *In the labelling, making available on the market and advertising*

*of cosmetic products, no texts, designations, trademarks, illustrations and other pictorial or non-pictorial signs may be used which purport to have characteristics or functions which the products concerned do not possess.*

When it comes to active agents, for example, their concentration must be sufficient to be allowed to advertise their properties. This is often not the case for products with a long INCI list. On the other hand, claims about substances that are not contained are not permissible if they are self-evident. A massage oil based on fatty oils, for example, cannot be advertised as "without preservatives". This is because products without a water phase do not need preservatives.

Concentration information is sometimes misused in the trade. If a product contains 10% hyaluronic acid gel, this is often advertised as 10% hyaluronic acid, although the hyaluronic acid content in the gel is only 1%, which ultimately corresponds to a content of 0.1% in the end product.

## What else is in it...

Sometimes, the absence of substances explicitly prohibited by the KVO is also indicated – for example "Without cortisone". Cortisone may only be used in medicinal products. If liposomal properties are described, liposomes must also be included. This is rather not the case with a sunscreen advertised in this way. Conversely, to claim that the sunscreen does not contain nanoparticles when titanium dioxide is used in a corresponding amount does not correspond to reality either.

## Animal testing

"No animal testing" is a matter of course, since animal testing of cosmetics has been banned for quite some time. However, if it is proven that no animal testing – for example to determine toxicity – was carried out by manufacturers or third parties in the entire chain, i.e. also for all ingredients and, if applicable, their precursors, this claim is possible. However, this is a very rare exception and limited to sim-

<sup>1</sup> Lautenschläger H, Magistralrezepturen – Kosmetische & pharmazeutische Kombinationen, *Beauty Forum medical* 2020 (2), 22-25

ple products such as natural skin care oils without further additives.

### Heal & Relieve

It is no secret that cosmetics can be of great help for various skin disorders.<sup>2</sup> However, corresponding references are not permitted for the treatment of indications such as acne, neurodermatitis, psoriasis & Co, even if a significant improvement occurs through the skin care accompanying the indication. Advertising with the terms cure and alleviate or their synonyms is reserved for medicinal products alone. Alternative practitioners must also comply with this regulation.

The Cosmetic Directive allows active pharmaceutical ingredients if it does not explicitly prohibit them. In principle, however, the Cosmetic Directive prohibits systemic effects, whereby e.g. essential oils (aromatherapy) are borderline. Typical medicinal substances used in cosmetics are D-panthenol, salicylic acid, azelaic acid, clotrimazole, piroctone oleamin, tranexamic acid. They have to be uncritical in their use concentrations due to the obligatory safety report according to the KVO and the labels partly contain warnings as in the case of salicylic acid. References to medicinal effects must not be made. Products with clotrimazole and piroctone oleamin, for example, are clearly antifungal. They would be suitable for the treatment of athlete's foot, but may only be advertised as anti-dandruff agents.

At the time, the German Federal Institute for Risk Assessment (BfR) did not see any risk in using azelaic acid up to 1% as a consistency agent in cosmetics. As long as no anti-acne effect (medical indication) is advertised, even higher concentrations are possible – if they do not pose a risk in the safety report.

### Products from the medicine man

In connection with product names, additions from medical terminology are often used. "Medical", "dermatological" skin care or "dermocosmetic" care are neither to be classified under medicinal products, nor under medical devices, but under cosmetic products. Additions such as "medical", "med" as well as the "Dr" of the company owner in the product name of cosmetics are also permitted as long as no explicit reference is made to a medical indication.

Medical devices usually have similar compositions to cosmetics, but not infrequently contain substances that have long been regulated or

<sup>2</sup> Lautenschläger H, Grenzgänger – Kosmetische Hautpflege auf den Punkt gebracht, Beauty Forum 2010 (8), 27-29

banned in the KVO. In contrast to cosmetics, they are allowed to indicate use for physical ailments. The evidence is rightly questioned by institutions such as Stiftung Warentest.<sup>3</sup>

One more comment on detox preparations: Detox is a health claim and therefore not permissible – as the German Federal Supreme Court has already ruled for herbal tea mixtures.<sup>4</sup>

### Control bodies

Compliance with the KVO is controlled by very different institutions in Germany. In North Rhine-Westphalia, it is often, but not always, the veterinary and chemical inspection offices, in southern Germany it is usually the district administration offices. In some cases, municipalities and public order offices are also involved.

The very different supervisors do not exactly contribute to clarity for those involved. Inspections do not take place regularly, but on a random basis and with prior notification.

Unauthorised advertising statements can also affect the law against unfair competition. In addition to the state offices, warning associations are active in this area on their own initiative or on behalf of third parties.

Only a few years ago, advertising with dermatological cosmetics led to warnings from distributors. In the meantime, however, it has become clear that the sustainability of cosmetics is unthinkable without taking dermatological and physiological findings into account. Conversely, dermatology is increasingly using cosmetic compositions to treat its patients – without the side effects of conventional medicines.<sup>5,6</sup>

### Sources on the Internet

Relevant sources on the topic of advertising can be easily found via the search engines on the net:

- European Cosmetics Directive – Regulation (EC) No. 1223/2009 (KVO)

<sup>3</sup> Lautenschläger H, Den Durchblick behalten – Was Medizinprodukte und kosmetische Produkte unterscheidet, Kosmetik International Top Medical 2020 (1), 42-45

<sup>4</sup> Mythos Entgiften, Stiftung Warentest 2022 (1), 18-19

<sup>5</sup> Lautenschläger H, Dermatologische Kosmetik – Brücke zwischen Kosmetik und Medizin, Kosmetische Praxis 2005 (5), 12-14

<sup>6</sup> Lautenschläger H, Lecture: Kosmetische Dermatologie und Dermatologische Kosmetik, 8.05.2021, BEAUTY FORUM Xperience (online)

- Legal framework for cosmetics – Publisher: German Federal Office of Consumer Protection and Food Safety
- Food, Commodities and Feed Code (LFGB)
- Commission Regulation (EU) No 655/2013 establishing common criteria for substantiating claims made in relation to cosmetic products
- Medical Devices Act (MPG)
- Alternative practitioner Act (HeilprG)
- Pharmacy Operations Ordinance (ApBetrO)
- Unfair Competition Act (UWG)

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